(3)

Supreme Court, U.S.
FILED
MAR 20 1998
CLERK

No. 97-1286

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

In Re: Joseph Smith & Sons, Inc., Debtor.

FRED G. ZEHNER,

Petitioner,

v.

ROBERT PAUL SMITH, ET AL

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Fred G. Zehner
Pro Se
1990 Holland Cliff Road
Huntingtown, MD 20639
(410) 257-3751

16 pp

QUESTION(S) PRESENTED

I. SPECIAL CASE & STRICT LIABILITY

The proceedings in this matter have so far departed from the accepted and usual course of judicial proceedings, and sanctioned such a departure by the lower court, as to call for an exercise of this Court's supervisory power. All parties involved are in the business of recycling and shipping/disposal of dangerous, toxic and hazardous materials. Because the handling of toxic hazardous waste is involved, strict liability is an issue where utmost care is required because of the great risk to the public.

II. ABUSE OF PROCESS

A. Did the U.S. Court of Appeals for the Fourth Circuit err in its determination that the facts material to resolution of this appeal are not in dispute?

B. Did the U.S. Court of Appeals for the Fourth Circuit err in its determination that the Appellant failed to meet his burden of proof supporting his claim as to abuse of process?

III. DENIAL OF DUE PROCESS

A. Did the Judge err in his determination to conclude the bankruptcy hearing prior to allowing the testimony of all witnesses and experts present as indicated by counsel would be called at such hearing, thereby denying Appellant due process?

B. Was the appellant denied due process by the fact that: (i) he has been and continues to be denied a copy of the tape of the bankruptcy hearing, even though the Fourth Circuit made

their hearing tapes available immediately without question, yet bankruptcy court continues to refuse tapes, and (ii) that the court record has been altered in a major way?

C. Was the appellant denied due process by the fact that he lost his jury trial because of Smith and his attorney's clear perjury to the trial court to delay this case until Smith found a vehicle to evade the set jury trial?

IV. PERJURY/FRAUD UPON THE COURT

A. Did the Judge err when he referred to Appellant's lack of pursuit of discovery sanctions remedies at the lower court level, when the record clearly reflects such remedies were in fact pursued by Appellant?

B. Did the Trial Court err in its determination to deny appellant's requests for discovery sanctions for Appellee's refusal to cooperate with discovery based upon Appellee's perjury and fraud upon the court by falsely indicating that the all important non-existing documents had been provided to Appellant?

V. UNCLEAN HANDS

A. Did the court err in its decision in not finding against the Appellee based upon the doctrine of unclean hands, in that there was fraud in the possession of Smith's main witness false manufactured evidence dated 47 days before the lawsuit was filed and that Appellee was dismissed from a mutual business association for attempting to involve Appellant Zehner in a mutually beneficial and illegal enterprise?

LIST OF PARTIES

Respondents contend that Petitioner incorrectly listed three parties as "parties to the proceedings." However, in accordance with Supreme Court Rule 14(1)(b), the Petition for Certiorari clearly states that the list is of "all parties to the proceeding in the court whose judgment is sought to be reviewed (unless the caption of the case contains the names of all the parties)." All parties listed by Petitioner are in fact parties to the proceeding sought to be reviewed.

Respondents' contentions are incorrect, as Petitioner correctly listed all parties as required by Supreme Court Rule 14(1)(b).

TABLE OF CONTENTS

PAGE

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 2

CONCLUSION 10

TABLE OF AUTHORITIES CITED

CASES

In Re Michael, 326 U.S. 224, 227, 66 S.Ct 78, 79, 90 L.Ed 30 (1945) 7

Nix v. Whiteside, 106 S.Ct 988, 475 U.S. 157, 89 L.Ed.2d 123 (1986) 7

Brasen v. United States, 396 U.S. 74 (1969) 8

LaChance, et al v. Erickson, U.S. Sup. Ct., No. 96-1395, 1/21/98) 8

Seagirt Realty Corp. v. Chazanof, 196 N.E.2d 254 (1963) 10

STATUTES AND RULES

U.S. CONST., amend. V 1

U.S. CONST., amend. VII 1

U.S. CONST., amend. XIV, Section 1 1

OTHER

None

OPINIONS BELOW

The opinion of the United States Court of Appeals appears at Appendix A to the petition and is unpublished. The opinion of the United States District Court appears at Appendix B to the petition and is unpublished.

JURISDICTION

The date on which the United States Court of Appeals decided by case was August 5, 1997. A timely petition for rehearing was denied by the United States Court of Appeals on the following date: September 17, 1997, and a copy of the order denying rehearing appears at Appendix D to the petition.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondents submit that the petition does not relate to any statutory provisions, and that Petitioner has not raised any issues pertaining to bankruptcy provisions.

The petition raises issues pertaining to the bankruptcy proceedings and constitutional provisions of due process, including but not limited to denial of complete discovery, lack of jury trial, and inability to enter evidence of damages sustained. U.S. CONST., amend. V; U.S. CONST., amend. VII; U.S. CONST., amend. XIV, Section 1.

STATEMENT OF THE CASE

Petitioner adopts and incorporates herein as if restated in full the Statement of the Case from his Petition for Writ of Certiorari.

Respondents incorporate in their opposition the statement of facts from the opinion of the United States Court of Appeals for the Fourth Circuit. However, as stated and clearly documented in the petition, that statement of facts contains false information and has been consistently disputed by Zehner throughout this case.

REPLY AND REASONS FOR GRANTING THE PETITION

I. Special Case & Strict Liability

The proceedings in this matter have so far departed from the accepted and usual course of judicial proceedings, and sanctioned such a departure by the lower court, as to call for an exercise of this Court's supervisory power, in accordance with Supreme Court Rule 10. A complete review of this case will clearly document that Petitioner has continually and repeatedly been denied due process as a result of the Respondents' perjury and abuse of the legal system.

Strict liability was clearly raised as an issue when the Complaint was introduced as evidence by Petitioner during the bankruptcy hearing, over the strong objection of Respondent. Wyrough himself introduced the Complaint as evidence, as it was included with the transfer documents from state court to bankruptcy court. Further, Petitioner's unrebutted testimony at

the bankruptcy hearing as to Respondent's attempts to enter into a business arrangement involving the shipping of tanks laden with highly explosive and toxic hazardous-laden materials also raised the issue of strict liability.

II. Abuse of Process

A. *The U.S. Court of Appeals for the Fourth Circuit erred in its determination that the facts material to resolution of this appeal are not in dispute.*

Respondents submit that "items" cited by Petitioner were not part of the record on appeal. Respondents fail to specifically cite which "items" they claim are not part of the record; however, without such specification of which "items" they are referring to, Petitioner objects and is unable to properly respond and, therefore, it must be assumed that such items are in fact part of the record.

Further, for clarification purposes, the items cited by Petitioner included the depositions of Robert Smith and William Taylor, which are in fact part of the record on appeal. The deposition transcript of William Taylor was attached to the Proof of Claim filed by Petitioner. The deposition transcript of Robert Smith was attached and included in a package submitted by Petitioner's attorney to the U.S. Court of Appeals for the Fourth Circuit.

Respondents submit that the petition should not be granted because the asserted error consists merely of an allegation of erroneous factual findings. Petitioner submits that the proceedings in state court "so far departed from the accepted and

usual course of judicial proceedings, or such a departure by a lower court, as to call for an exercise of this Court's supervisory power" as a result of Respondents' perjury throughout the discovery process, as more fully set forth in the petition.

B. *The U.S. Court of Appeals for the Fourth Circuit erred in its determination that the Appellant failed to meet his burden of proof supporting his claim as to the three elements of abuse of process (i.e. competition and ulterior motive, perverted use of legal system after filing, and damages).*

Respondents submit that Petitioner failed to meet the third element supporting his claim of abuse of process, i.e. damages. However, by agreement of counsel the hearing was bifurcated and Petitioner was unable to present any evidence of damages, despite the fact that he suffered substantial damages (seized property) as a result of Respondents' pressing the fictitious claims against him. As such, the Fleet case cited by Respondent does not apply. Further, Respondents' attorney Wyrough knowingly misused Fleet as he knew it did not apply because he was a party to the bifurcation (a clear coverup which misled the U.S. Court of Appeals for the Fourth Circuit in its clearly erroneous decision).

Further, the proceedings in this matter have so far departed from the accepted and usual course of judicial proceedings, and sanctioned such a departure by the lower court, as to call for an exercise of this Court's supervisory power.

III. Denial of Due Process

A. *The Judge erred in his determination to conclude the bankruptcy hearing prior to allowing the testimony of all*

witnesses and experts present as indicated by counsel would be called at such hearing, thereby denying Appellant due process.

Respondents claim that Petitioner did not object at the hearing, and thus, the issue was not preserved below and may not be raised before this Court. However, Petitioner again contends that the proceedings in this matter have so far departed from the accepted and usual course of judicial proceedings, and sanctioned such a departure by the lower court, as to call for an exercise of this Court's supervisory power.

Although Petitioner was advised by the judge that the hearing would continue a second day, it was concluded following an off-the-record bench conference without any closing arguments or the ability to call remaining witnesses to testify, thereby denying Petitioner an opportunity to properly present and preserve his case. Petitioner was misled by the court when he was assured that the hearing would continue a second day. Both counsel advised the judge of the witnesses for each side. Respondent's counsel stated the witnesses he **would** call were Smith, Nathanial Exum and Edgar Johnson. In front of the court, Zehner was promised by Respondent's attorney Wyrough that he "**would** be calling Paul Smith" as a witness and that led Zehner to believe that the court **would** require Wyrough to keep his word to have Smith testify, so as to afford Zehner's counsel an opportunity to question Smith. Zehner was misled and deceived by Respondent's counsel Wyrough in front of the court, in that Wyrough stated Smith **would** be called as a witness but was **not**. This limited Zehner's testimony because Zehner would have provided much more elaborate testimony had he not been misled that Smith **would** testify.

Further, Judge Schiff stated that there would be more testimony than time available that afternoon, but that **"all day tomorrow is available to conclude this matter."** Zehner and Widmer testified, however, the hearing was cut short by the judge following Widmer's testimony and no other testimony was allowed as promised. As such, Petitioner was denied an opportunity to properly present and preserve the case.

B. *The appellant was denied due process by the fact that he has been and continues to be denied a copy of the tape of the bankruptcy hearing, even though the Fourth Circuit made their hearing tapes available immediately without question, yet bankruptcy court continues to refuse tapes, and that the court record has been altered in a major way.*

Respondents claim that Petitioner did not object at the hearing, and thus, the issue was not preserved below and may not be raised before this Court. However, Petitioner could not possibly have objected to this issue at the hearing, as he was not aware that the record had been altered until some time later when he received the printed transcript. Petitioner was denied an opportunity to properly defend and preserve the case. Again, Petitioner contends that the proceedings in this matter have so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power.

C. *The appellant was denied due process by the fact that he lost his jury trial because of Smith and his attorney's clear perjury to the trial court to delay this case until Smith found a vehicle to evade the set jury trial.*

Respondents claim that Petitioner did not object at the hearing, and that the issue was not preserved below and may not be raised before this Court. Respondents further claim that the issue of right to a set jury trial was not previously raised and object to it being raised now. The factual basis for this error is clearly part of the documented record. The set jury trial was lost because of absolutely documented perjury to the court by Respondents and their attorney to deliberately stonewall the case and prevent the specially set jury trial. "This Court long ago noted: 'All perjured relevant testimony is at war with justice, since it may produce a judgment not resting on truth. Therefore it cannot be denied that it tends to defeat the sole ultimate objective of a trial.'" In Re Michael, 326 U.S. 224, 227, 66 S.Ct. 78, 79, 90 L.Ed 30 (1945), as cited in Nix v. Whiteside, 106 S.Ct 988, 475 U.S. 157, 89 L.Ed.2d 123 (1986).

Again, had normal judicial procedures been followed prior to Respondents' filing bankruptcy, the set jury trial would have gone forward and the case would have been totally resolved at the state court level. However, Respondent again perverted the legal system by filing bankruptcy as a means to avoid the set jury trial.

IV. Perjury/Fraud Upon the Court

A. *The Judge erred when he referred to Appellant's lack of pursuit of discovery sanctions remedies at the lower court level, when the record clearly reflects such remedies were in fact pursued by Appellant.*

Respondents claim that Petitioner did not object at the hearing, and that the issue was not preserved below and may not be raised before this Court. Petitioner did in fact file for

sanctions against Respondents, more than once. However, because of Respondents perjury and fraud upon the court during the discovery process, the court was misled to believe that no sanctions had been filed. Again, Petitioner was denied appropriate relief as a direct result of the perjury of Respondents and their attorney.

In LaChance, et al v. Erickson, et al, 66 LW 4073, USSupCt No. 96-1395, Chief Justice Rehnquist indicated that "In Brasen v. United States, 396 U.S. 74 (1969), we said: 'Our legal system provides methods for challenging the Government's right to ask questions -- lying is not one of them. A citizen may decline to answer the question, or answer it honestly, but he cannot with impunity knowingly and willfully answer with a falsehood.' Id. at 72." Respondents and their attorney have repeatedly committed perjury in this case, and such perjury is clearly documented.

B. *The Trial Court erred in its determination to deny Appellant's requests for discovery sanctions for Appellee's refusal to cooperate with discovery based upon Appellee's perjury and fraud upon the court by falsely indicating that documents had been provided to Appellant.*

Respondents claim that Petitioner did not raise this objection, that the issue was not preserved below and may not be raised before this Court. The factual basis for this error is clearly part of the documented record. Respondents' perjury is clearly documented in the record by his inconsistent statements as to documents provided to Petitioner. Respondent stated under oath that he provided all requested documents to Petitioner, thereby causing denial of Petitioner's first request for sanctions.

Petitioner again filed for sanctions and Respondent then stated had not and did not provide any documents to Petitioner claiming privilege. This is clear perjury. The trial court erred in not granting sanctions as requested by Petitioner, thereby denying Petitioner procedural due process.

Again, had normal judicial procedures been followed prior to Respondents' filing bankruptcy, the set jury trial would have gone forward and the case would have been totally resolved at the state court level. However, Respondent again perverted the legal system by filing bankruptcy as a means to avoid the set jury trial.

V. Unclean Hands

A. *The court erred in its decision in not finding against the Appellee based upon the doctrine of unclean hands, in that there was fraud in the possession of Smith's main witness false manufactured evidence dated 47 days before the lawsuit was filed and that Appellee was dismissed from a mutual business association for attempting to involve Appellant Zehner in a mutually beneficial and illegal enterprise.*

Respondents claim that Petitioner did not object at the hearing, and that the issue was not preserved below and may not be raised before this Court. The factual basis for this error is clearly part of the documented record. The issue of unclean hands was first raised in state court in the Answer of co-defendant Davis ("Davis defense"), in that the Fourth Affirmative Defense alleged that Respondents were "guilty of unclean hands." Then, Wyrough himself introduced said Davis defense as evidence, as it was included with the transfer documents from state court to bankruptcy court. Further, Petitioner's unrebutted

testimony at length at the bankruptcy hearing as to Respondent's unclean hands activities raised this issue.

Petitioner has clearly documented the fraudulent activities of Respondent. Respondent manufactured false evidence to incriminate Petitioner, in that business cards were planted in William Taylor's files to make it appear that Petitioner had met with Taylor, when in fact, Petitioner had never met Taylor. Further, approximately six months prior to Respondent's filing of this lawsuit, Respondent attempted to enter into a business arrangement with Petitioner involving the shipping of tanks laden with highly explosive and toxic hazardous-laden materials six months prior to filing of this lawsuit by Respondent.

"It is well-established law that our courts will not grant relief to a plaintiff who does not come into equity with 'clean hands.' These cases stand for the proposition that relief will not be granted by our courts to one who stands to profit by his own fraud, and the plaintiff in this action should not be permitted to do so." Seagirt Realty Corp. v. Chazanof, 196 N.E.2d 254 (1963).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Fred G. Zehner

FRED G. ZEHNER 3/18/98